



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 30, 1993

Ms. Diana L. Granger
City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR93-715

Dear Ms. Granger:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552.¹ We assigned your request ID# 21809.

The City of Austin (the "city") has received a request for certain competitive bidding proposals. Specifically, the requestor seeks "copies of the proposals that were awarded contracts under the following RFP[s] issued by the City of Austin in 1992":

RFP No. 920695 - 3LI
Technical Assistance, Bonding, Financing and Education

RFP No. 920696 - 3LI
Marketing and Outreach

RFP No. 920697 - 3LI
Rolling Owner Controlled Insurance Program

You advise us that you have made some of the requested information available to the requestor.

¹We note that the Seventy-Third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act now is codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Section 552.301(a) of the Government Code provides:

A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time but not later than the 10th calendar day after the date of receiving the written request.

Section 552.302 provides:

If a governmental body does not request an attorney general decision as provided by section 552.301(a), the information requested in writing is presumed to be public information.

You advise us that you failed to request a decision within the ten day period that section 552.301(a) of the Government Code mandates.

When a governmental body fails to request a decision within ten days after the date of receiving a request for information, we must presume the information at issue to be public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982) at 1-2. The governmental body must show a compelling reason to withhold the information to overcome this presumption. *See id.* Normally, a governmental body can overcome the presumption of openness by a compelling demonstration that the governmental body should not release the requested information to the public, e.g., that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2. You claim that section 552.110 excepts some of the requested information from required public disclosure.

Pursuant to section 552.305 of the Government Code, we have notified Business Resource Consultants ("Business Resource") of the request and have solicited arguments in support of your assertion that section 552.110 excepts the submitted information from required public disclosure. In response, we have received a letter from Business

Resource. Business Resource claims that section 552.110 excepts its proposal from required public disclosure.²

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Business Resource claims that the information submitted to us for review constitutes trade secrets. Accordingly, we need only address the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business* [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757, cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one

²Business Resource also claims that section 552.104 excepts the submitted information from required public disclosure. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect governmental interests in commercial transactions; ordinarily, it does not apply once, as here, contracts have been awarded. *See* Open Records Decision No. 541 (1990) at 4-5. Neither the city nor Business Resource indicate why the city may withhold the submitted information under section 552.104 at this time. Accordingly, the city may not withhold the submitted information under section 552.104.

submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.³

The information submitted to us for review is a proposal for marketing and outreach services. We have examined the documents submitted to us for review and have considered Business Resource's arguments in support of its contention that this information constitutes "trade secrets" within the meaning of section 552.110. Although this office has held in prior opinions that some of the kinds of information contained in Business Resource's proposal may constitute "trade secrets," *see, e.g.*, Open Records Decision Nos. 552 (1990) at 3 (stating that customer lists may constitute trade secret, but only if company makes *prima facie* case); 494 (1988) at 3 (same); 437 (1986) at 4 (same), Business Resource's arguments are largely conclusory and do not establish a *prima facie* case that the submitted information constitutes "trade secrets." *Cf.* Open Records Decision No. 554 (1990) at 5. Accordingly, the city may not withhold the submitted information under section 552.110 and must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kimberly K. Oltrogge
Assistant Attorney General
Open Government Section

³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757, cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a claim under section 552.110, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

KKO/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 21809
ID# 22332

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